NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 28

LCDT 023/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 5** Applicant
AND	**YVONNE BARTON** Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS

Ms A Callinan

Ms A Kinzett

Ms N McMahon

Mr K Raureti

DATE OF HEARING 28 August 2020

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 10 September 2020

COUNSEL

Ms Y Yelavich for the Standards Committee

Mr M Dillon for the Respondent

DECISION OF TRIBUNAL RE PENALTY

[1] Ms Barton admitted one charge of misconduct under s 241 Lawyers and Conveyancers Act 2006 ("the Act") in her capacity as a legal executive. Over almost 10 months, without her employer's knowledge or permission, she cut and pasted client signatures onto eight documents and the signature of a principal of her employer onto four documents. Although the charge is laid alternatively under s 11(a) or (b) of the Act, we find her liability falls under s 11(a) because the conduct occurred in the course of her employment (rather than "unconnected with her employment …") albeit conduct not authorised by her employer.

Is a legal executive's culpability assessed against a lower standard?

[2] Mr Dillon submits that the fact Ms Barton is charged as an employee, not as a lawyer or conveyancing practitioner, is a relevant distinction. Pointing to the additional qualifications and privileges attaching to lawyers, he argues that observations in cases concerning lawyers about maintaining professional standards and breach of duties apply to Ms Barton to a lesser degree.

[3] Ms Yelavich opposes the proposition that a lesser standard operates for employees. She observes that the public should not be afforded lesser protection from the behaviours of employees than that of lawyers and conveyancers.

[4] The first and second purposes of the Act[1] are:

> "(a) to maintain public confidence in the provision of legal services and conveyancing services;
>
> (b) to protect the consumers of legal services and conveyancing services"

[1] Section 3(1).

[5] Although the third purpose is "to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner" [2] the main thrust of s 3(1) speaks generally of "the provision of legal services and conveyancing services." This embraces a wider ambit than one merely targeting lawyers and conveyancing practitioners. Where legal executives are employed, their work falls squarely within the broad ambit of s 3(1)(a) and (b). Their reputation sits generally within and associated with the two professions referenced in s 3(1)(c).

[6] It might be suggested that s 3(2), in its list of provisions, addresses lawyers and conveyancers without specifically noting legal employees, but this change of directed interest prefaces other features in the Act. We do not read it as derogating from the broad purview of s 3(1). Similarly, although the title to the Act references only "Lawyers and Conveyancers", the omission of specific reference to incorporated law firms, conveyancing practitioners, barristers, lawyer employees, or employees who are not practitioners does not preclude those persons or entities from liability to be disciplined under the Act.

[7] The Act does deal, quite specifically, with the various categories of person or firm subject to discipline. The Act differentiates "misconduct"[3] and "unsatisfactory conduct"[4] depending on the respective roles of lawyer or incorporated law firm, conveyancing practitioner or incorporated law firm, lawyer employee, or employees who are not practitioners. The Act provides discipline for each of those groups. It is the Tribunal's duty to discipline those among them who come to its notice.

[8] The section under which Ms Barton is charged, s 11, applies only to employees who are not practitioners. The Act already differentiates between the different roles by establishing those individual entry-points. But it does not follow that there is any difference of standard applicable for a person within their relevant role. If Parliament intended different standards to apply, we would expect to see such a significant matter explicitly expressed in the Act: we cannot find any such provision. It is readily apparent that a legal executive cannot appear in Court for a client or be a principal in a law firm. But a conveyancing practitioner can do any work that a legal executive can do. There are possible overlaps of function. Within their role-appropriate tasks, for example, a

[2] Section 3(1)(c).
[3] In ss 7 – 11.
[4] In ss 12 – 14.

lawyer or conveyancing practitioner who certifies something that could be certified by a legal executive is not held to a higher professional standard: nor is the legal executive held to a lower standard.

[9] We reject the gloss for which Mr Dillon argues. We hold that the standard of professionality is not a sliding scale. It follows that disciplinary precedents concerning lawyers' professional standards and breach of duties are no less relevant in a case like Ms Barton's. How general statements should translate in individual circumstances is, of course, always an exercise of judgment.

What are the relevant circumstances in this case?

[10] Ms Barton had extensive relevant experience by the time she carried out the offending behaviour. She qualified as a legal executive in 1997 and, even after these events, continued with professional training while working for another firm. Although having worked as a legal executive for many years, and unquestionably a senior, experienced legal executive, she was not a registered legal executive during the time of offending. She says she achieved that status in the months following the employment where her offending occurred.

[11] The forged client signatures involved six Land Transfer Tax Statements ("LTTS"), one trustee certificate and a fixed rate acknowledgement form for a bank. The principal's signature was cut and pasted onto two solicitor's certificates, a LINZ instrument and a LTTS statement. No financial loss was caused by the forgeries.

[12] Immediately before going overseas on holiday, Ms Barton placed some files in the boot of her car, thus removing them from the office. During her absence, her employer audited her files, unearthing some of these matters.

[13] When confronted, she seems to have neither admitted nor denied the allegations. She did not admit wrongdoing to the Standards Committee. Almost one year on, she swore an affidavit[5] flatly denying the allegations:

[5] 18 July 2018.

> "I was shocked when … accused … of doctoring files, taping signatures onto unsigned documents and committing fraud. I responded that this was a horrible accusation I had not committed fraud. (sic)[6]
>
> "I have never doctored files as has been alleged, and have never taped signatures on to unsigned documents and have never committed any fraud.[7]
>
> "I am providing this statement in affidavit form due to the seriousness of the allegations against me."[8]

[14] Because Ms Barton defended the charge, the case was set down for a two-day hearing to determine liability. About five or six weeks before the hearing, following discussions between counsel, she indicated through Mr Dillon that she would accept liability. In an affidavit sworn 7 August 2020, she said: "I have agreed to resolve the charge against me on the basis I will accept I have committed misconduct." Immediately thereafter, she attributed her behaviour to "pressure and stress in my employment." She said: "I altered some forms to cover mistakes like not getting them signed by clients, and then I denied doing this when I was investigated. I did it because I was scared of what might happen to me if these mistakes were found out."

[15] A week before the hearing, she filed a letter dated 21 August 2020 in these terms: "I wish to state my remorse and sincere apologies for my actions in this matter. I didn't mean to cause any harm. I accept my acts where not appropriate." (sic) At the outset of the hearing, she said she meant "were" instead of "where" in that statement.

[16] In our view, Ms Barton's acceptance of responsibility was late, partial and grudging. For almost three years, she flatly denied guilt. She compounded her wrong-doing by deliberately lying on oath in her July 2018 affidavit. When acknowledgement came, she attempted to displace her blame on to her former workplace. In her dealings with the Standards Committee she describes it as "a toxic work environment[9]." She described "negative attitudes towards [her] from staff"[10] and the allegations as "entirely unwarranted character assassination."[11]

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[6] Affidavit 18 July 2018: Bundle, 92 at [24].
[7] Ibid, 92 at [25].
[8] Ibid, 94 at [35].
[9] Ibid, 93 at [31].
[10] Ibid
[11] Ibid, at [29].

[17] Among Ms Barton's attempts to deflect responsibility was her theme that the workplace was toxic. The weight of evidence, several affidavits from co-workers, indicates her view as singular. From her subjective standpoint, perhaps she felt unsure of her position. That might explain the oddness of such risky behaviour in someone so senior. Clearly, she found herself unable to confess her inadequacies to her employers. Despite her alleging that the workplace was unsupportive, and while we understand that this may have been her view, we perceive no balanced objective basis for us to share the view. On her own admission, she undertook some of the forgeries because she had used outdated LTTS forms and, when closing files, realised her error. Rather than starting afresh, she concealed her error by forging signatures. The issue seems to have emanated from her desire to conceal her shortcomings rather than an unfriendly environment, as viewed by her in retrospect.

[18] In her curriculum vitae, Ms Barton discloses her former community involvements, an impressive range of activities. Her admission of liability exposes her to a 'fall from grace' in a community in which she has held positions of responsibility. We acknowledge a significant extent of shame and embarrassment that accompanies this.

What is the appropriate penalty?

[19] The Standards Committee seeks an open-ended order under s 242(1)(h)(ii) prohibiting Ms Barton's employment by a practitioner or incorporated firm. That would require subsequent application to the Tribunal to establish her fitness to be employed in a particular role. Mr Dillon submits that a censure and a modest fine should suffice but he recognises the possibility of a finite period of prohibition for legal employment.

[20] Ms Barton is 57 years of age. The aberrant behaviour was begun, and continued, when she was of mature age, holding seniority in her profession. The 12 forgeries were done on different types of documents over many months. It was a covert course of dishonest conduct.

[21] That no financial loss was caused is notable, not as a mitigating factor, but as the absence of an aggravating factor. In our view, Ms Barton discovered she had not properly completed documents on certain files. Rather than admitting her errors, she

forged documents to represent formal completion. The behaviour was borne out of inadequacy and pride, a desire to sustain standing in the office which was not backed up by performance.

[22] Ms Barton's denials and lying in an affidavit are congruent with that understanding of her offending – she wanted to avoid losing face at all costs. Even when asked the simple question what was going on for her when the forgeries occurred, she wanted to speak privately with her lawyer before responding. We gave her that opportunity. From what followed, it seems likely that her guardedness was mainly against the strength of her own passionate guilt and private remorse.

[23] In our view, Ms Barton's previous expressions of remorse appear perfunctory, even grudging. But in her own voice at the hearing, her misery was unmistakable. She spoke of feeling "overwhelmed and stressed" at the time of her wrongdoing. She acknowledged she had missed some information with the new LTTS form and altered the documentation. Without prompting, she apologised for the impact she had on her former employer's firm. She said: "There hasn't been a day in the last [three] years since I left … that I haven't regretted my actions." In our view, she did herself more credit in those frank, heartfelt responses than in her avoidant and dishonest denials that marked this matter previously.

[24] Ms Barton's last employers gave her a complimentary reference.[12] After taking that employment, she advised her new employers that "she was under some sort of disciplinary matter."[13] She worked there for five months. They found her to be "honest, pleasant, punctual and a good worker."[14]

[25] We accept the Standards Committee's submission that the primary purpose of the present proceedings is not punishment[15] but the maintenance of professional standards, to denounce the conduct, and to deter others from similar offending. To that, we would add rehabilitation. An order prohibiting a respondent from taking up certain employment constitutes a powerful curb on the respondent's career. In

[12] Bundle, 28 – 29.
[13] Ibid
[14] Ibid
[15] *Daniels v Complaints Committee 2 of the Wellington District Law Society* HC CIV 2011–485–227, 8 August 2011.

Ms Barton's case, it has been her lifetime career. Consideration of rehabilitation is part of a balanced assessment of penalty.

[26] Among the cases cited to us, two stood out as useful comparators. In *The New Zealand Law Society's Wellington Standards Committee 1 v Nalder*[16] a recently qualified, not yet registered legal executive accidentally came across the will of her father-in-law and breached the duty of confidence by telling her husband about its provisions. She took immediate responsibility for this isolated incident. Although the finding was of unsatisfactory conduct (a lesser level than in the present case), an order prohibiting her employment in comparable position was made for 18 months. In *Taranaki Standards Committee v Flitcroft,*[17] a lawyer with five years' experience, admitted five charges of misconduct, similar to the present case except the respondent forged his employer's name on the document for speed and convenience. Like the present case, no personal gain was involved and the offending happened on several occasions (between five and eight). He immediately admitted his actions and co-operated with the investigation. The Tribunal noted he was a young lawyer "who is entitled to a second chance having made mistakes."[18] He had suffered a period of voluntary suspension. The Tribunal would have ordered 15 months but reduced it to four months, taking into account the period of 11 months already elapsed.

[27] We find *Flitcroft* of special assistance because it involved a practitioner who, although relatively young, was moderately experienced and in a position of responsibility as an associate. It too involved a series of transactions. The difference in motivation was convenience by shortcut (*Flitcroft*) and concealing inadequate work (Ms Barton). We do not regard the arithmetical tally of incidents as a material marker between these cases. In both cases, the behaviour was repeated several times.

[28] Material differences are that Ms Barton denied, lied and caused unnecessary cost and effort for the Standards Committee and her former employer. Her guilty plea was late. These compounding features are almost more troubling than the original offending. Only when she spoke at the hearing did we gain a tolerable understanding of what had formerly seemed inexplicable behaviour.

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[16] *The New Zealand Law Society's Wellington Standards Committee 1 v Nalder* [2015] NZLCDT 5.
[17] *Taranaki Standards Committee v Flitcroft* [2010] NZLCDT 36.
[18] Ibid, at [14](c).

[29] We now regard this behaviour as an atypical period of poor behaviour by an experienced legal executive. The fact of these matters, and her avoidant manner of responding, create inevitable concerns for any potential employer. Supervision would be a necessary component. Nonetheless, we accept that she has skills, and that she has apparently performed satisfactorily, even in the months immediately after these concerns arose. In our view, an indefinite period of prohibition elevates the matter higher than it now seems. She has blotted her record late in her career, but we do not regard this series of transactions as indicative of her general work behaviour. She did alert her last legal employer to some extent about this matter. That gives us some confidence in the efficacy of the undertaking she has offered.

[30] On balance, our starting point for a period of prohibition is 18 months. We are prepared to discount it, but, in these circumstances, only by six months. Accordingly, we will make a prohibition order effective for 12 months from the date of this decision.

[31] Ms Barton is not in a strong financial position. She had a period of poor health around the time she left her subsequent legal employment. We do not regard a fine as being an appropriate component in this case, noting that her having not worked in law for the past 16 months will have had a financial cost.

Orders

[32] Ms Barton does not seek an order for permanent name suppression.

[33] We make an order suppressing the name of the law firm involved, its principals and employees, the location of the firm and any client details.

[34] We order under s 242(1)(h)(ii) that no practitioner or incorporated firm employ Ms Barton in connection with that practitioner's or incorporated firm's practice for 12 months from the date of this order.

[35] Ms Barton must honour her undertaking to the Tribunal that she will inform any prospective employer who provides legal services or conveyancing services of this decision.

[36] Ms Barton is censured in the following terms:

> Yvonne Barton, by forging signatures of a principal and clients on documents, you brought discredit on yourself, your employer and the industry that provides legal services and conveyancing services to the public. Your concealment of this repeated activity aggravates your wrongdoing. So too do your longstanding denials, compounded by swearing a false affidavit to the same effect. You were a senior legal executive with many years of experience. You betrayed the trust of clients, employer and workmates. Such actions bring the legal and conveyancing industry into disrepute. Members of the public and institutions have less confidence that their affairs will be managed with honesty and candour. Your example makes employers generally, more wary of their employees. The position of legal executive is one that carries duties and obligations. Your actions blemish your record considerably.

[38] Because Ms Barton is legally aided, and no exceptional circumstances arise, we make no order for costs.

[39] The Tribunal s 257 costs certified in the sum of $2,318 are payable by the New Zealand Law Society.

DATED at AUCKLAND this 10th day of September 2020

Judge J G Adams
Deputy Chair